SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1906.

NO. 121.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

NORTHERN LUMBER COMPANY, A CORPORATION,

Appellant,

v.

WM. O'BRIEN, ALBERT J. LAMMERS AND OTHERS,

Appellees.

BRIEF OF O'BRIEN ET ALS., *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CURCUIT

J. N. SEARLES,
Solicitor for Appellees.

SUPREME COURT
OF THE UNITED STATES

NORTHERN LUMBER COMPANY, A CORPORATION,
Appellant,

vs.

WM. O'BRIEN, ALBERT J. LAMMERS et als.,
Appellees.

BRIEF OF O'BRIEN, et als., *Appellees.*

Taking up the history of the title to the property involved in this cause, chronologically, it is as follows:

1864, *May 5th.* Congress granted lands to the State of Minnesota for the purpose of aiding in the construction of a railroad in said state from the city of St. Paul to the head of Lake Superior, the land being described as

> "Every alternate section of *public* land of the United States, not mineral, designated by odd section, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, within the State of Minnesota, but in case it shall appear that the United States have, when the line or

> route of said road is definitely fixed, sold, apportioned, *reserved,* or otherwise disposed of any sections, or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same," then the Secretary of the Interior was required to select indemnity lands in lieu of those thus lost.

1864, *May* 7. The Lake Superior & Miss. R. Co. filed its map of general location, under this grant, requesting the government to withdraw for the benefit of the grant a strip of land sufficient to satisfy the grant. See map and certificate of James Smith, attorney, endorsed thereon; Exhibit "A" attached to stipulation of facts—p. 36, Transcript of Record.

The land in question lies within ten miles of the line of road as laid down on this map of general location, or within the place limits of the grant.

1864, *May* 26. The commissioner forwarded to the register and receiver of the land office at Duluth, Minn., a letter of instruction in which he says:

> "The Secreary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption settlement and sale a body of lands about twenty miles in width, as indicated on the endorsed diagram 'A,' marked 'Lake Superior and Mississippi Railroad.'"

This diagram is the same as the map of general location, except it shows colored bands, or strips on both sides the line of road as indicated by the general location map. See stipulation p. 26-27, and 35, Transcript of Record.

1864, *July* 2. Congress granted lands to the Nor. Pac. R. Co. in words as follows:

> "There is hereby granted, etc., every alternate section of *public* lands, not mineral, designated by odd numbers, to the amount of.....ten alternate sections per mile on each side of said railroad, whenever it passes through any state, and whenever, on the line thereof, the United States have full title,

not reserved, sold, granted, or *otherwise appropriated,* and free from pre-emption, or other claim or right, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted or otherwise disposed of, other lands shall be selected" as indemnity lands, etc.

1866, *Sept.* 25. The L. S. & M. R. Co. filed its map of definite location, whereby this land was left outside the place limits of its grant.

1882, *July* 6. The Nor. Pac. R. Co. filed its location map and thereafter filed its map of definite location showing its grant of lands in place to include this land, *if this land was "public land and a portion of the mass of public land" at the time of the grant to it, July 2, 1864, out of which such grant could be satisfied.*

Since the commencement of this action, the land in controversy has been patented by the United States to Mary E. Coffin on her selection of said lands in lieu of lands relinquished to the United States within a certain forest reservation. This appears from the allegation of the supplemental bill, Folio 59, p. 48, Transcript Folio 63, id., p. 51, Transcript; Answer Fol. 66, p. 53; Transcript.

ON THIS STATEMENT OF FACT

complainant contends that this land fell within the grant to the Nor. Pac. R. Co., on the theory that

1. The withdrawal proceedings existing at the time of the Nor. Pac. R. Co. grant, were—in the language of the complaint—

"So vague, uncertain, indefinite and inaccurate that it is impossible for your orator to ascertain or determine whether or not the land hereinbefore described fell within the place or indemnity limits, as shown on said map or diagram; and that the language of the attempted order of withdrawl as contained in said letter of May 26, 1864, is so vague, uncertain and indefinite that your orator cannot determine whether or not it was thereby intended to include within such attempted withdrawal the land hereinbefore described. And your orator shows that said attempted withdrawal of land by such commissioner of the general land office was wrongful and without authority of law."

Bill of Complaint, Par. VIII.

2. If otherwise, then the subsequent grant to the Nor. Pac. R. Co. operated to override this withdrawal and bring this under the Nor. Pac. R. Co. grant, as "public land."

FIRST.

Was the withdrawal proceeding sufficient to take this land out of the class of "public lands" mentioned in the Nor. Pac. grant?

This question is raised by the Bill of Complaint but the point was not pressed in the Circuit Court or in the Circuit Court of Appeals, and we do not suppose this Court will be called upon to consider it. As a matter of prudence, however, we here state our view of the question.

The *line* of the proposed road was definitely laid down on the map filed by the L. S. & M. R. Co.

The word "about" used by the Commissioner in his withdrawal letter addressed to the Register and Receiver at Duluth, does not render his direction indefinite or uncertain.

See Letter, Bill of Complaint, Par. VIII. Record p. 26.

The rule is, that when the context limits and restrains the meaning of the word "about" its use does not materially impair the certainty of a description.

Adams v. Harrington, 114 *Ind.* 66.
Corey v. Swagger, 74 *Ind.* 211.
Jones v. Plummer, 2 *Lott.* 161.
Purinton v. Sedgley, 4 *Me.* 283-6.
Stevens v. McKnight, 40 *Ohio, St.* 341.
Balt. Land Soc. v. Smith, 54 *Md.* 204.
Sanders v. Morrison, 2 *T. B. Mon.* 109.
Shipp v. Miller, 2 *Wheat* 316.
Cutts v. King, 5 *Me.* 482.
Bodley v. Taylor, 5 *Cranch*, 224.
Johnson v. Panel, 2 *Wheat*, 206.

The *context* to which we are at liberty to refer in aid of this description is the grant which specified a width of ten miles each side of the road—or a total width of twenty miles.

The Commissioner could withdraw twenty miles—or ten miles on each side of the road.

Indeed the Commissioner could withdraw, as we shall hereafter see, any amount in his discretion.

In *Bodley v. Taylor, ante*, the expression "about seven miles" from a given place for the commencement of a boundary was held to be seven miles.

In *Johnson v. Pannel's Heirs*, 2 Wheat. 206, it was held, that "in ascertaining a place to be found by its distance from another place, the vague words 'about' or 'nearly' and the like, are to be rejected if there are no words rendering it necessary to retain them, and the distance is to be taken positively."

Whatever acts the department considered as a withdrawal operated as such, for no others can complain.

As late as Nov. 2, 1866, the department recognized this withdrawal proceeding as valid. See letter of Commissioner transmit-

ting diagram showing permanent or definite location of L. S. & M. road, dated Nov. 2, 1866. *Stipulation Par. IX. Record p. 27.*

Also letter of Secretary to Commissioner, dated March 19, 1901. *Stipulation Par. X. Record p. 29.*

The diagram prepared by the department to show limits of withdrawal on general route for the L. S. & M. R. Co. by letter of May 26, 1864, on map of same filed May 7, 1864, shows this land to be within *three miles* of the road, as located on general route. *Stipulation Ex. "A." Record p. 37.*

The decision of the Secretary of the Interior quoted in the bill of complaint herein, dated July 16, 1901 (*Record p. 31*), shows that the Department still considers the withdrawal sufficient, and the Nor. Pac. Ry. Co. submitted its claim to this land on grounds that assumed these lands to have been withdrawn by the Commissioner's letter of May 26, 1864, as appears from the following quotation from the same, Folio 40 Transcript.

> The appeal filed on behalf of the railway company is based upon the ground that the *withdrawal of May 26*, 1864, being a withdrawal upon map of probable or general route, did not prevent congress from granting the lands so withdrawn in aid of the Nor. Pac. R. Co. and that they were included in the grant to that company made by the act of July 2, 1864 because falling without the limits of the grant made by the act of May 5, 1864, as established by the definite location of the L. S. & M. railroad, no right ever attached to them under the earlier grant."

The Secretary of the Interior had authority to withdraw these lands from sale, pre-emption or other disposition, without express authority from congress or the president.

Wood v. Beach, 156 U. S. 548.
Spencer v. McDougal, 159 U. S. 62.
Merrill v. Chi., Etc., Ry. Co., 70 *Fed.* 464.

Kan., Pac. Ry. Co., v. Atchison Etc. Co., 13 *Fed.* 106.
Walcott v. Des Moines Co., 5 Wall. 681.

A withdrawal of public lands from sale by competent authority for the purpose of appropriating them to any lawful purpose operates to sever them from the public domain.

Wilcox v. Jackson, 13 Pet. 498.
Leavenworth Etc. v. U. S., 92 U. S. 745.
R. R. Co. v. Freeman Co., 9 Wall. 94.

The Department has ruled that this withdrawal affects unsurveyed as well as surveyed lands. 11 *L. O. Dec.* 186.

An interesting digest of decisions in the Land Department and the Supreme Court on the power of the Land Department to withdraw lands in aid of a grant, in anticipation of its definite location, is found in the dissenting opinion of Brewer, J., in the recent case of

Nelson v. Nor. Pac. R. Co., decided Jan. 26, 1903.

While the majority of the court in this Nelson case differed from the dissenting judges, Brewer, Brown and Shiras, there is nothing in the opinion of the court indicating that they differed with the dissenting judges on the question of power of withdrawal, *where it is not restrained by special limitations such as they found in the Nor. Pac. Ry. Co. charter.*

The court found special restrictions in that charter, limiting this power of withdrawal, while the dissenting judges could not agree with the court in that view.

SECOND.

Did the Nor. Pac. granting act override the departmental with-

drawal, and thus include the land in question among the "public lands" referred to in that act?

The decision of the department on the application of the Northern Pac. R. Co. for patent for this land, which is set out in the Bill of Complaint—Par. X.—indicates that complaint then relied as it still relies upon

U. S. v. Oregon, Etc., R. Co., 176 U. S. 128.

The decision and facts involved in this case are as follows—to state them chronologically.

1864, *July 2.* Congress made its grant to the Nor. Pac. Ry. Co. in the following words, to-wit:

> "Every alternate section of land, not mineral, designated by odd number, etc., whenever, on the line thereof the U. S. have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption or other claim or rights, at the time the line of said road is definitely fixed and a plat thereof filed, etc."

Sec. 6 required a survey of 40 miles in width after

> "general route shall be fixed and as fast as may be required by the construction of the railway, and the odd numbered sections hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company."

1865, *Mar.* 6. Mr. Perham, president of the Nor. Pac. Ry. Co., filed a map which the court, for argument's sake, treated as a map of general location and *requested a withdrawal of lands.*

For reasons stated in the letters of the Commissioner (and referred to in the opinion) *no lands were ever withdrawn* in aid of the N. P. R. Co. grant along the line included in that suit, nor did the company ever construct its road along or opposite to the lands there in question.

The opinion says:

"There never was any withdrawal of the indemnity lands on the proposed line between Wallula and Portland, nor any *definite location or construction* of the road—opposite to the lands in suit." *Op. p.* 42.

1866, *July* 25. Congress granted to the defendants—Oregon and California companies—"public lands, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile," etc.

If any land so described was found to have been "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of"

other lands were to be selected, etc., under direction of the Secretary of the Interior.

It was made the duty of the secretary as soon as the companies, or either of them filed in his office a map of the survey or any portion not less than 60 continuous miles, to withdraw from sale the lands granted on either side of the road as far as located and within limits specified.

1869, *Oct.* 29. The Oregon Cent. Co. filed its map of "definite location" opposite the lands in controversy.

1870, *Feb.* 29. The foregoing map was accepted by the Secretary.

1870, *Feb.* The lands in question were withdrawn by the Secretary and afterwards the road was built in time to save the grant from forfeiture.

1870, *May* 31. Congress by the act of that date, granted the Nor. Pac. R. Co. the right to construct its main line to Puget Sound, via the Columbia River, with a grant for this new location the same as for the original road and in the same terms.

1870, *Aug.* 4. Nor. Pac. R. Co. filed map of general route along the Columbia River and the Secretary withdrew lands opposite that line, including the lands in controversy.

1890, *Sept.* 29. Congress forfeited all interest of the Nor. Pac. R. Co. in these lands by reason of non-construction of that part of its road. *26 Stats. at Large,* 496, *Chap.* 1040.

The lands had been patented to the Oregon Company, the government brought the suit to cancel the patents, claiming they had been issued by mistake, on the theory that

> "the land so patented—although within the limits of the grant contained in the Grant of July 25, 1866, and within the line of the Oregon Company as definitely located—were excluded from that grant, because included in the grant previously made to the Nor. Pac. R. Co. by act of July 2, 1864; in which case it was insisted they became forfeited to the U. S. by the act of Sept. 29, 1890." *Op.* 35.

On this state of facts the court said

> "The contention of the Government renders it necessary to ascertain what interest, if any, was acquired by the Nor. Pac. R. Co. in these lands by virtue of the Act of July 2, 1864." *Op.* 36.

The opinion reached the following conclusions, viz:

1. The grant to the Nor. Pac. R. Co. of July 2, 1864, was a "float" which conferred no right or title to any particular section until definite location of the route.

Many previous decisions to this effect are cited, among others Butts v. Nor. Pac. R. Co. 119 U. S. 55, U. S. v. Nor. Pac. R. Co. 152 U. S. 284 and Nor. Pac. R. Co. v. Sanders 166, U. S. 620.

The opinion says,

> "Until such definite location it was competent for Congress to dispose of the public lands on the genral route of the road as it saw proper." *Op.* 44.

2. If "the Perham map" were regarded as a sufficient map of the general route of the Nor. Pac. R. Co.—nothing stood in the

way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such map was filed in the Land Department and before a definite location of the Nor. Pac. railroad.

3. The grant to the Oregon Co. was such an act, and followed as it was by *definite location of the road* before the Nor. Pac. R. Co. filed map of definite location (and while the land had not been withdrawn from sale, etc.,) the Oregon Co. became entitled to the land.

What woud have been the situation *if the land had been withdrawn by executive order* the court does not say, and has no occasion to say.

The court refers to Menotti v. Dillon, 167 U. S. 703, and other cases to support its conclusion that Congress had power to grant to the Oregon Co. land embraced within the exterior limits of the general route as defined by the Perham map, but they were speaking of a case where there was no withdrawal order affecting the land, so as to take it out of the class of *public* lands.

In the *Menotti* case it was held that the subsequent grant included the lands there in controversy, nothwithstanding the filing of the map of general location of the road and a withdrawal by the executive department.

But this decision was because the language of the subsequent grant was so worded as to lead to the conclusion that *Congress, intended to override the executive withdrawal,* as of course, it could do, for there having been no definite location of road under the first grant, the right of the government to sell, reserve, etc., the lands had not terminated.

In the Menotti case, the subsequent grant was to the State of California in the following words,—

"In all cases where the State of California has heretofore made selections of any portion of the public domain, etc.—the lands so selected shall be and hereby are confirmed to said state: Provided, that no selection made by said state contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to *any lands which have been reserved for naval, military or Indian purposes by the United States,*" etc.

This proviso does not exempt from this grant to California *lands withdrawn for benefit of previous railroad grant;* and for this reason the court held that the lands in question were not excepted from this grant to California by the mere fact of a general location map under a prior grant or it vested no interest in the prior grantee, nor by reason of an executive withdrawal, because congress could, and in this case intended to, disregard the executive withdrawal proceedings.

That this decision did not involve a determination of the effect of a withdrawal order, appears from the following extracts from the opinion, to-wit:

"The Government, however, has insisted in its bill that the issuing of the patents to the Oregon & California Railroad Co. was without authority of law. This contention rests upon the assumption that the lands so patented—although within the limits of the grant contained in the Act of July 25, 1866, and within the line that the Oregon Company had definitely located—were excluded from that grant because included in the grant previously made to the Northern Pacific Railroad Co. by the Act of July 2nd, 1864, See c. 217, 13 State, 365; in which case, it is insisted that they were forfeited to the United States by the Act of Sept. 29, 1890, c. 1040, 26 Stat, 496, and should be so adjudged." *Op. p.* 34 *and* 35.

* * * * * * * * *

"If therefore, the Perham Act of 1865 were conceded for the purposes of present discussion to have been sufficient as

a map of 'General Route'—and nothing more can possibly be claimed for it—these lands could not be regarded as having been brought by that map (Even if it had been accepted) within the grant to the Northern Pacific Railroad Co., and thereby had become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under the statutes enacted by Congress after the filing of that map, and before any definite location by the company of its line." *Op. p.* 43 *and* 44.

* * * * * * * * *

"We take it then to be undisputable that even if the Perham map of 1865 were regarded as a sufficient map of the 'general route' of the Northern Pacific Railroad, and not, to use the language of Judge Ross in this case, a mere sketch or diagram unauthenticated by an engineer or officer charged with the duty of designating such a route, nothing stood in the way of Congress granting to another railroad company any lands within the exterior lines of that route, by a statute passed after such a map was filed in the Land Department and before a definite location of the Northern Pacific railroad. Such a statute was that of July 25th, 1866, granting lands to aid in the construction of a railroad from the Central Pacific Railroad in California to Portland, Oregon. That the lands here in dispute—even if within the general route of the Northern Pacific Railroad as defined by the Perham map of 1865—are within the exterior limits of the grant to the Oregon Company contained in the subsequent Act of 1866, is expressly averred in the bill filed by the United States."

WE HAVE, THEN, IN THIS OREGON CASE, A DECISION THAT WOULD GIVE THE LAND IN CONTROVERSY TO THE NOR. PAC. R. CO., IF THE WITHDRAWAL FOR THE BENEFIT OF THE L. S. & M. R. CO. HAD NOT TAKEN THIS LAND OUT OF THE CLASS OF *PUBLIC* LAND, OR IF THE N. P. R. CO. GRANT HAD BEEN WORDED AS IN THE MENOTTI CASE SO AS TO SHOW THE INTENT OF CONGRESS TO DISREGARD THE WITHDRAWAL.

NELSON V. NOR. PAC. R. CO. 188 U. S. 108.

Since this cause was commenced the Supreme Court has rendered a decision in the foregoing entitled action which merits consideration.

The short facts in this action were as follows:

July 2, 1864, Congress passed the Nor. Pac. R. Co. grant.

Aug. 20, 1873, the map of general route was filed.

Nov. 1, 1873, the Commissioner withdrew "from *sale* or *entry*" the land in question, which was within 40 miles of the route as designated on the map.

In 1881 Nelson occupied this land under the homestead laws and continuously thereafter resided upon it.

Dec. 6, 1884, the railroad company *definitely* located its line, and the land in question lies within 40 miles of this definite location, and coterminous therewith.

In 1893 the land was surveyed.

As soon as surveyed Nelson attempted to enter it as a homestead, but his application was rejected, because in the opinion of the register and receiver it conflicted with the grant to the Nor. Pac. R. Co.

May 10, 1895, patent issued to the Nor. Pac. R. Co.

Nelson continuing in possession, the railroad company brought this action to recover possession, claiming ownership, which the defendant denied.

The opinion of the majority of the court determined the action in favor of Nelson on the following argument:

The Court say:

"When that (No. Pac.) grant was made, substantially the entire country between those points (its termini) was untravelled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States. The principal object of the grant, as will appear from its language, was to secure the safe and speedy transmission of the mails, troops, munition of war, and public stores, by means of a railroad and telegraph line, and to that end and in order to bring the public lands into market, it was deemed important to *encourage the settlement of the country* along the proposed route.

"The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the government to establish homes upon the unsurveyed public lands they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

"Such was the situation when the act of July 2, 1864, was passed. Necessarily the act must be interpreted in the light of that situation. It should not be interpreted so as to justify the charge that the government laid a trap for the honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families.

"And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line."

Having thus stated the situation and object of Congress the Court proceed to an examination of the grant.

Sec. 3 is given in full, with certain words italicised, showing the stress laid upon them—

"That there be and hereby is granted, etc., for the purpose, etc., every alternate section of public land, not mineral, designated by odd numbers, to the amount, etc., whenever it passes through any state, *and* whenever on the line thereof the United States have full title not reserved, sold, granted, or otherwise appropriated *and free* from pre-emption, or *other claims or rights* at the time the line of said road *is definitely located,* and a plat thereof filed, etc., and whenever, *prior to said time* (of definite location) any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers,* or pre-empted or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof,* etc."

"Sec. 6. That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route

shall be established, and as fast as may be required by the construction of said road; and the odd sections of land thereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." (The further provisions extending the pre-emption and homestead laws to the even sections at double price are also quoted.)

The Court say:

By this 6th section it was declared that the odd sections 'hereby granted,' that is by this act granted, should not be liable to sale, entry or pre-emption before or after they were surveyed except by the company as provided in the act.

"But we have seen, looking at section 3, which was the granting section of the act, that Congress did not *grant* every odd numbered alternate section within the general limits specified, but *only* the odd numbered alternate sections to which the United States had full title and which had *not* been previously reserved, sold, granted or otherwise appropriated, *and* which were *free* from pre-emption' or other claims or 'rights' *at the time* the line of the road was *definitely* fixed—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, *at the date of definite location,* to have been disposed of or to be *occupied by homestead settlers."*

"The first inquiry is whether the railroad company acquired any *vested* interest in the land in dispute by reason merely of the acceptance by the Land Department of its map of *general* route, or (2) by reason merely of the withdrawal order of 1873."

The Court determines that no such vested right existed, citing previous decisions, viz:

St. Paul & P. R. Co. v. Nor. P. R. Co., 139 *U. S.* 1.

United States v. Nor. Pac. R. Co., 152 *U. S.* 284.

Nor. Pac. R. Co. v. Sanders, 166 *U. S.* 620.

Menotti v. Dillion, 167 *U. S.* 703.

United States v. Oregon Etc., 176 *U. S.* 28.

Wilcox v. Eastern Or. L. Co. 176 *U. S.* 51.

Messinger v. Eastern Or. L. Co., 176 *U. S.* 58.

The Court say:

"The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map; and that until definite location the land covered by the map of general route was a 'float,' that is at large."

After referring to *Buttz v. Nor. Pac. R. Co.* 119 *U. S.* 55, *and* explaining that there is nothing in that case inconsistent with their present view, the court continue:

"It results that the railroad company did not acquire any vested interest in the land here in dispute in virtue of its map of general location, or the withdrawal order based thereon; and if such land was not free from pre-emption or other claim or rights, or was occupied by homestead settlers at the date of definite location on Dec. 8, 1884, it did not pass by the grant of 1864."

Then the court reiterate the reason for this conclusion, springing out of the last clause of Sec. 3 (the granting section) and the public policy in inducing settlers to occupy the unsurveyed wilderness, and the care manifested in protecting the railroad company by providing indemnity lands in lieu of those it might lose within place limits by reason of pre-emption or homestead settlements.

The following distinctions between the Nelson case and the one sub judice are to be observed:

1. The Nelson case presents an instance where the Land Department undertook to effect a withdrawal of land in aid of the grant, which the terms of the grant, (as expressed in the granting section) *declared should be and remain open to homestead settlement.*

The withdrawal could not have taken effect without repealing

the last clause of the granting section of the Nor. Pac. R. C. charter, which *expressly kept out of the grant lands falling within specified classes.*

The Court lay great stress on the inducement held out to immigrants to those uninhabited regions, who risked their lives and fortunes in reliance on the rights secured to them by the general land laws and saved to them by the granting clause of the N. P. Charter.

Now, in the L. S. & M. grant the language of the granting clause is simply "public lands;" it does not say public lands which are free at time of definite location from any sale, pre-emption, etc.

There is nothing in the granting section of the L. S. & M. grant *expressly saving to the public the right to pre-empt or occupy for homestead, etc.;* consequently there is nothing expressly or impliedly taking away from the department the right to do what it had from the beginning been recognized as having the right to do, viz: withdraw this land from pre-emption settlement and sale in aid of the L. S. & M grant.

Moreover, there was no vast uninhabited region to be occupied by this 160 miles of road between St. Paul and Lake Superior, that justifies the court in saying that it would be bad faith to give the withdrawal in this case effect, nor does it appear that the lands involved were unsurveyed, so that homestead settlers, or others, could not determine whether they were settling on odd or even numbered sections.

The L. S. & M. grant does not require a withdrawal prior to definite location, but recognizes the right of the Department to deal with the lands as it saw fit. It left the citizen, contemplating settlement on these lands, to his rights under the land laws as

affected by the recognized practice of the department to withdraw lands in its discretion.

2. The Nelson case presents an instance where the department undertook to *enlarge the grant* to the Nor. Pac. R. Co. by keeping out of market by its withdrawal order, lands, which, by the term of the grant were to be kept open for settlement until definite location.

Nothing less than legislative power could do this, and it cannot be otherwise, than, that a withdrawal order cannot be recognized if it seeks to withdraw lands which the legislature has declared shall remain open to settlement or other disposition under the general land laws.

Now the L. S. & M. grant contains no language expressly or impliedly intimating that the right of the citizen to acquire land under the existing laws, or the right of the department to withdraw lands and thus suspend the right of the citizen, is to be affected until definite location.

On the contrary Sec. 3 recognizes that odd sections or parts of sections might remain subject to disposal under the general laws, for it provides for indemnity lands in lieu of lands thus lost.

This shows that the control of the department over the public lands whether by withdrawal order or otherwise was left unimpaired.

This means that the department could withdraw lands in aid of the L. S. & M. grant, as had been done in aid of other grants.

3. The withdrawal in aid of the L. S. & M. grant does not run counter to an express reservation in favor of settlers, or others found in that grant, as the withdrawal in the Nelson case did.

This will clearly appear from a comparison of the two grants as to their granting, indemnity and legislative withdrawal provisions, which are given below in full, in parallel columns:

(*L. S. & M. Granting Clause.*)

"Sec. That there be, and hereby is granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad in said state from the City of St. Paul to the head of Lake Superior, every alternate section of *public land* of the United States, not mineral, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, within the State of Minnesota.

(*Nor. Pac. Granting Clause.*)

"Sec. 3. That there be, and hereby is granted to the Nor. Pac. R. Co., its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of mails, troops, munition of war and public stores, over the route of said railway, every alternate section of *Public land*, not mineral, designated by odd numbers, to the amount of twenty sections alternate sections per mile, on each side of said railroad, as said company may adopt through the territories of the U. S. and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, *and whenever on the line thereof, the United States have full title, not reserved, sold granted, or otherwise appropriated, and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

(*Indemnity Clause.*)

"But in case it shall appear that the United States have, when the line or route of said railroad is definitely fixed, sold, appropriated, reserved or otherwise disposed of any sections, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same then it shall be the duty of the Secretary of the Interior to select from lands of the United States, etc. (an amount equal to those sold or otherwise appropriated, or to which the rights of pre-emption or homestead settlement may have attached as aforesaid.")

(*Legislative Withdrawal Clause.*)

"Sec. 3. That when said road shall be definitely located and a plat thereof filed with the Secretary of the Interior, the lands hereby granted shall not thereafter be subject to settlement, pre-emption or private entry, adverse to this grant."

(*Indemnity Clause.*)

"And whenever, prior to said time, any of said sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior," etc.

(*Legislative Withdrawal Clause.*)

"Sec. 6. That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption, before or after they are surveyed except by said company, as provided in this act"—

4. The decision in the Nelson case is *Sui generis*, inasmuch as it rests upon the view a majority of the court took of the limitations imposed on the grant by the last clause of the granting section.

The Court did not undertake to lay down a rule that would apply to other railway grants, for they say:

> "The words 'occupied by homestead settlers' show that Congress intended by the Charter to the Northern Pacific Railroad Company—whatever it may have intended as to other companies receiving grants of public lands---that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim*, which. existing at the date of definite location, would exclude from the grant, land that might otherwise be covered by it."

The dissenting opinion considers this opinion of the Court as subversive of the principle adapted in

Buttz v. Nor. Pac. R. Co. 119 *U. S.* 55.
Hewett v. Schultz, 180 *U. S.* 139.
Menotti v. Dillion, 167 *U. S.* 703.
Nor. Pac. R. Co. v. Musser-Sauntry, Etc., 168 *U. S.* 604.
U. S. v. Oregon & C. R. Co. 176 *U. S.* 28.

These cases recognize the right of the department to withdraw lands from market in aid of a railway grant in anticipation of definite location of the road.

This Nelson case simply adds to this rule the qualification that where the terms of the grant to the Railway (as in the Northern Pacific) expressly provides that the rights of homestead settlers shall not be taken away until definite location, the power of the Department to withdraw lands as against homestead settlers is taken away.

That this view of the Nelson case is correct appears from the reference thereto found in the opinion of the Court, in the case of *Toltec Ranch Company vs. Cook,* 191 *U. S. Op.* 541, as follows:

> "Nelson v. Northern Pacific Railroad Company was an action brought by the Railway Company to recover possession of a quarter section of land claimed to be within the land grant

of the Northern Pacific Railroad, and the company held the patent. Nelson claimed to have settled upon the land three years before the definite location of the road. He claimed, therefore, to be within the exceptions of the grant. The land when he settled on it was unsurveyed, and the effect of this constituted one of the questions in the case. Upon the filing of a map by the railroad company of its general route, an order was made by the Land Department withdrawing from settlement the land within the limits of the grant. The effect of this order was another question in the case. It was held, 'that the railroad company did not acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such a map,' and it was further held that Nelson's settlement upon the occupancy of the land was valid, and constituted a claim upon the land within the meaning of the Northern Pacific Act of 1864. In other words it was held that the land was excluded from the grant by express words. The operative words which produced the effect was expressed in the following provision of Section 3 of the Act: 'And, wherever, prior to said time, (of definite location) *any* of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted or otherwise disposed of, *other lands* shall *be selected* by said *company in lieu* thereof," etc., etc.

THIRD.

LANDS WITHDRAWN FROM SALE, ETC., ARE NOT "PUBLIC LANDS" WITHIN THE MEANING OF RAILROAD GRANTS.

Nor. Pac. Co. v. Musser-Sauntry Etc. Co., 168 *U. S.* 604.

In this case there had been a withdrawal of lands in indemnity limits made in aid of earlier grant to a railroad, prior to filing of map of definite location by the Nor. Pac. R. Co. and it was held that *such withdrawal operated to except the withdrawn lands from the Nor. Pac. Co. grant.*

This resulted from the words "reserved," "or otherwise appropriated" and "free from pre-emption or other claim or right" limiting the class of lands out of which the N. P. R. Co. grant could be satisfied.

The Court say the withdrawal was in effect a "reservation," and cite,

Wolcott v. Des Moines Co., 5 *Wall*, 681.

where it was held that the Proviso in a grant to the State of Iowa for the benefit of certain railroads,—"That any and all lands *heretofore reserved* to the United States by any act of Congress, or in *any other manner by competent authority*, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be and the same is hereby reserved from the operation of this act" operated to take certain land out of the grant to the state.

The Court say:

> "It has been urged that these lands had not been reserved by competent authority, and hence that the reservation was nugatory.
>
> "As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first by the Secretary of the Treasury, when the land department was under his supervision and control, and again by the Secretary of the Interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the President and Cabinet.
>
> "Besides, if this power was not competent, *which we think it was* ever since the establishment of the Land Department, and which has been exercised down to the present time, the grant of 8th Aug. 1846, carried along with it, by necessary application, not only the power, but the duty of the Land Office to reserve from sale the lands embraced in the grant, otherwise its object might be entirely defeated."

St. Paul & Pac. v. Nor. Pac. R. Co., 139 *U. S. I.* 18.

The court say: *Op.* 18.

In the recent case of Buttz v. R. Co. 119 U. S., 72, this court speaking of the act making the grant to the Nor. Pac. Co. said:

> "Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections for sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."
>
> "After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, *except by special legislative declaration*, nor, indeed in the absence of its announcement, after the general route is fixed."

In this case of Nor. Pac. R. Co. v. Musser-Sauntry Etc. Co., 168 U. S., the Court say:

> "By the Nor. Pac. grant Congress meant that only such lands should pass as were *public lands* in the fullest sense of the term and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of the road." *Nor. Pac. v. Sanders*, 166 *U. S.* 620.

Hewett v. Schultz, 180 *U. S.* 473, (*L. ed.*) is a very instructive case on the power of the Land Department to withdraw lands from sale or other disposition.

Justice Brewer here says:

> "From the beginning of land grants the Land Department has exercised the power of withdrawing from pre-emption and homestead entry any body of lands, which in its judgment might be necessary for the satisfaction of the grant. And the existence of this power has been affirmed by this court

in many cases, and without a single exception up to the present time," and the learned Judge proceeds to cite many decisions which need not be here repeated.

Wilcox v. Jackson, 13 *Pet.* 497, (1839)

Since 1824 the lands had been reserved by the authority of the President as a reservation for military purposes, known as Fort Dearborn, near Chicago, under laws authorizing him to select sites for such purposes.

In 1835 B. was allowed by the local land officers to pre-empt it and paying therefor he received the usual receiver's receipt under the pre-emption law, which law prohibited entry and sale thereunder of land "reserved for the United States — --- --- by order of the President or which may have been appropriated for any purpose whatever."

The court held that this land had been "appropriated" by authority of the law, for the President was authorized to establish forts on the frontier and his selection of this land as a portion of Fort Dearborn was within his discretion.

The Court adopted a principle for determining questions of this character, using the following language:

> "But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to *any purpose whatever*, from that moment the land thus appropriated *becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it, or to operate on it although no reservation were made of it.*" *Op.* 513.

Leavenworth. Etc. R. R. Co. v. U. S. 92 *U. S.* 733 (1875)

In 1825 the Osage Indians ceded to the United States a tract of land by which a certain part thereof was expressly "reserved" to them for occupancy so long as they chose.

In 1865 a further treaty was made whereby some of this reserved land was granted and sold to the government. in consideration for which sale the government, by the treaty of sale agree to pay the Indians a gross sum of money, to be deposited to their credit in the treasury of the United States and the interest thereon paid to the Indians annually. The treaty further provided that these relinquished lands should be surveyed and sold "as public lands are surveyed and sold under existing laws (including an act granting lands to the State of Kansas, in aid of a construction of a railroad through said lands) but no pre-emption claim or homestead settlement shall be recognized," and after reimbursing the government for its original sum deposited for them—$300,000—the costs of survey and sale the remaining proceeds were to be deposited as a "civilization fund" for the benefit of the Indians.

Two years before this last treaty—in 1863—Congress passed the act granting lands to the State of Kansas to aid in constructing certain railroads specified, by which act it was provided that,

> "In case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever," then other lands were to be selected as indemnity lands.
>
> Another clause exempted from the grant "all lands heretofore reserved to the United States, by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever."

Under this grant a map of definite location of the road of the appellant was filed, Jan. 2, 1868, and on the 21, Jan., 1868, this land was withdrawn by order of the Commissioner.

The appellant claimed that, "although the grant did not operate upon any specific land until the road was located, it then took effect upon those in controversy, as they, by reason of the extinction of the Osage title in the meanwhile, had become, in the proper sense of the term, *public land.*"

In determining that this railroad grant did not pass the lands that had been reserved to the Indians for occupancy as long as they chose, the Court took pains to state, with great deliberation, the principle upon which such grants should be construed.

The Court say:

"This grant like that to Iowa (for the improvement of the Des Moines river, construed in Dubuque, etc., v. Litchfield, 23 How. 66) was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should neither be enlarged by ingenious reasoning, nor diminished by strained construction. Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, *unless there be an express declaration to that effect.* An express exception was not necessary; because the policy that dictated them confined them (railroad grants) to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts."

They quote, with approval, the language of the same court in the Litchfield case, ante:

"All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the Acts of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed, in the statute and if not thus expressed, they cannot be implied" citing *Rice v. R. Co.* 1 *Block*, 380, *Charles River Bridge v. Warren*, 11 *Pet.* 120.

Elsewhere they say:

"In Wilcox v. Jackson, 13 Pet. 498—the court added: We go further and say, that whenever a tract of land shall

have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, proclamation, or sale would be construed to embrace it, although no reservation were made of it." It may be urged that it was not necessary in deciding that case to pass upon the question: but however that may be, the principle asserted is sound and reasonable and we accept it as a rule of construction. The Supreme Courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. *State v. Delesdenier, 7 Tex. 76, Spaulding v. Martin, 11 Wis., 274.*"

The Court elsewhere say:

"Walcott v. Des Moines Nav. Co. 5 Wall 681, was a controversy concerning the title to certain land, which, it was conceded, were covered by a grant, unless excluded by the proviso thereunto annexed. The court held that they were excluded, although the land had not been reserved to the United States. They had been, in fact, *reserved by the executive officers of the government, upon a mistaken construction of a prior grant made* by the United States to the State of Iowa. This decision was re-affirmed in *Williams v. Baker, 17 id. 144.*

Newhall v. Sanger, 92 U. S. 761.

Here was an executive withdrawal of land, as required by the terms of the grant to the railroad company, on filing map of general route, and at that time there was pending for determination a claim to the land under a Mexican grant.

The railway grant excepted lands "sold, reserved or otherwise disposed of by the United States," etc., and also declared that it should "not defeat or impair any — — — lawful claim, nor include any government reservation or mineral lands, or improvements of any *bona fide* settler."

Held: This land being *sub judice* at the time of the withdrawal, was not embraced in the grant.

The Court say:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

Doolan v. Carr, 125 *U. S.* 618, and *Cameron v. U. S.* 148 *U. S.* 301 are to the same effect. In the last two cases it is said that the exemption from the grant of lands subject to claim cannot be construed as subject to "lawful" claim . *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 *U. S.* 629.

Holds that under the grant to plaintiff, land subject to homestead claim when road is definitely fixed does not come under the grant afterwards in the event the homestead claim is not perfected.

To this effect also are,

Hastings Etc. R. Co. v. Whitney, 132 *U. S.* 357.
Sioux Falls Etc. v. Griffey, 143 *U. S.* 82.
Bardon v. N. P. R. R. Co., 145 *U. S.* 535.
Whitney v. Taylor, 159 *U. S.* 85.

In U. S. v. Oregon, Etc., Co., 176 *U. S.* 28 (*Op.* 46-7) the court, in speaking of the Menotti case, say:

"In Menotti v. Dillon the principal question was as to the rights acquired by a railroad company in virtue of its having filed its map of general route and the withdrawal by executive order of certain lands within the exterior lines of that route from pre-emption, private entry and sale—all before the passage of a subsequent act under which one of the parties claimed title to the land in dispute, the other claiming under the railroad Company."

The Court further said:

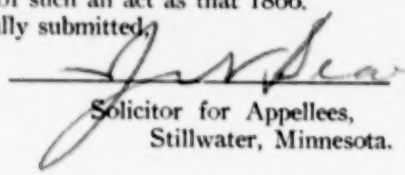
"It is said that the railroad company filed its map of general route on Dec. 9, 1864, and that these lands having been withdrawn from pre-emption, private entry and sale by execu-

tive order Jan. 30, 1865, they were not embraced by the act of 1866.

"In our opinion this is not a proper interpretation of the act. The proviso of the 1st section distinctly indicates certain cases to which the act should not apply, and distinctly excluding those cases and no others from its operation, the act in express words confirmed to the state 'in all cases' lands which the state had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of its passage, *were withdrawn from pre-emption, private entry and sale*, pursuant to the filing by the railroad company of its map of general route."

"And the Court should not construe the act as excluding lands in that condition, unless prepared to hold that Congress had no power to confirm to the state lands which, at the time, were simply withdrawn from pre-emption, private entry or sale for railroad purposes. We cannot so adjudge. The withdrawal order of Jan. 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that 1866.

Respectfully submitted,



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